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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 788

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

HENRY STONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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INDEX

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TRANSCRIPT OF RECORD

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 8527

F. G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, *Appellant,* versus HENRY STONE, PETITIONER, *Appellee.*	No. 1238 HABEAS CORPUS

Appeal from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.
United States Attorney, Atlanta, Ga.

HARVEY H. TYSINGER, ESQ.,
Assistant United States Attorney, Atlanta, Ga.,

H. T. NICHOLS, ESQ.,
Assistant United States Attorney, Atlanta, Ga.,
Council for Respondent

CLINT W. HAGER, ESQ.,
621 *Atlanta National Bank Bldg., Atlanta, Ga.*
Attorney for Appellee.

IN THE DISTRICT COURT OF THE

UNITED STATES

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

HENRY STONE, PETITIONER, versus F. G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT.	No. 1238 HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

Comes now your Petitioner, Henry Stone, and respectfully states, avers, and shows this Honorable Court that he is now illegally imprisoned and restrained of his liberty in the U. S. Penitentiary at Atlanta, Ga., and within the jurisdiction of this Honorable Court, by F. G. Zerbst, Warden of the said Penitentiary. The color of authority by virtue of which the said F. G. Zerbst, Warden of the said Penitentiary restrains and imprisons your Petitioner is a warrant of commitment issued by the United States District Court for the Middle District of Georgia, on the 23rd day of July, 1936, at Athens, a certified copy of which said warrant of commitment is hereto attached and marked as "Exhibit A", by which reference the said copy is made part of the records herein.

The said warrant of commitment was issued by the

said court pursuant to a judgment order, and sentence rendered and imposed after a plea of guilty had been entered by Petitioner to an indictment in the said court, a certified copy of which said judgment order and sentence and indictment are hereto attached and marked as exhibit "B" and "C", by which references the said copies of the said documents are made part of the records herein. Your Petitioner now states, and shows this Honorable Court that said F. G. Zerbst, Warden of said Penitentiary, is now wholly without any authority in law to further restrain and imprison your Petitioner for the following reasons, to wit:

1st. Your Petitioner has now fully served his sentence with deductions allowed him by law for good behavior, and has now fully complied with all the laws governing his case.

2nd. Petitioner having fully and lawfully served his sentence, the Warden of the United States Penitentiary, at Atlanta, Ga., is now wholly without lawful authority to further detain and restrain your Petitioner, and therefore his further imprisonment is in violation of the Constitution of the United States and is without due process of law.

STATEMENT OF FACTS

Petitioner entered a Plea of guilty to an indictment in the United States District Court for the Middle District of Georgia, at Athens, on the 23rd day of July 1936, and was then and thereupon sentenced by the Court to imprisonment in a Penitentiary for a period of 1 year, 1 day, (see exhibit "B"). The United States Attorney then called the court's attention to the facts

that Petitioner had theretofore been sentenced to the United States Penitentiary, at Chillicothe, Ohio, and that he had been paroled therefrom, and that he had not fully served his Parole Period, and was then wanted by the Warden of the said Penitentiary for Parole Violation. The Court then stated that Petitioner was up for sentence on an indictment charging a violation of the Internal Revenue Law, and that the Court could not enter into the merits and demerits of the Parole and its alleged violation. The Court then decided that the sentence of 1 year, 1 day, begins on that, the 23rd day of July 1936. Petitioner was duly delivered to the custody of the Warden of the United States Penitentiary, Atlanta, Ga., where he has since been confined. Petitioner now having fully served his sentence of 1 yr. 1 day with deductions allowed him by law for good behavior, as well as the 6 months which he had not served on his former sentence when he was released on Parole, the Warden refusing to release your Petitioner, he now prays this Honorable Court for the writ of *Habeas Corpus.*

Wherefore: Your Petitioner respectfully prays this Honorable Court that a *writ of Habeas Corpus* issue directed to the Warden of the United States Penitentiary, Atlanta, Ga., to bring and have your petitioner before this Court at a time to be determined by this Court, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this Court may proceed in a summary way to determine the facts in this regard, and the legality of your Petitioners imprisonment as the law and justice may require.

HENRY STONE, PETITIONER, No. 48901.

AFFIDAVIT

Personally appeared before me Henry Stone who being duly sworn, deposes and says that he has read the foregoing petition, that he knows the true contents thereof, and that the allegations therein contained are true, except as to such matters as are stated upon information and belief, and these he verily believes are true and that he believes he is entitled to the redress sought therein.

Sworn to and subscribed before me this 2d day of July, 1937.

ERNEST D. ETHERIDGE.
Notary Public, State at Large, Atlanta, Ga.

(NOTARIAL SEAL)

AFFIDAVIT IN FORMA PAUPERIS

Petitioner being duly sworn, deposes and says that he is a citizen and imprisoned and detained in the United States Penitentiary, Atlanta, Ga., and within the jurisdiction of this Honorable Court; that he wishes to bring an action in this Honorable Court to test the legality of his imprisonment and detention; but that because of his poverty he is unable to pay the costs of the said action or to give security for same, and that he is entitled to the redress sought therein, wherefore: Your Petitioner prays this Honorable Court to grant him permission to file and prosecute the said action without cost.

HENRY STONE, *Petitioner.*

Sworn to and subscribed before me this 2d day of July, 1937.

ERNEST D. ETHERIDGE,
Notary Public, State at Large, Atlanta, Ga.

(NOTARIAL SEAL)

ORDER GRANTING WRIT

Read and considered. Let the writ issue as prayed, in *forma pauperis*, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m. on the 10th day of July, 1937.

This the 9th day of July, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed July 9th, 1937.

NOTE: Exhibit "A", omitted, same appears as Exhibit "C", attached to answer on page 13.

EXHIBIT "C"—INDICTMENT

INDICTMENT FOR UNLAWFUL DISTILLING, ETC.

UNITED STATES OF AMERICA, ALBANY DIVISION, MIDDLE DISTRICT OF GEORGIA, UNITED STATES DISTRICT COURT, APRIL TERM, 1936

The Grand Jurors of the United States, selected, chosen and sworn in and for the Middle District of Georgia, upon their oaths present:

COUNT ONE

That on or about the 2nd day of March, A. D. 1936, in the Athens Division of the Middle District of Georgia, and within the jurisdiction of the said Court, in the County of Franklin, one Henry Stone; one Howard Fulbright and one Dempsey Thomas, whose further given name is to the Grand Jurors unknown, did unlawfully, willfully and knowingly have in his possession and custody and under his control a still and distilling apparatus for the production of spirituous liquors, set up without having the same registered as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States (26 U. S. C. A. 281; R. S. 3258.)

COUNT TWO

And the Grand Jurors aforesaid, upon their oaths

aforesaid, do further present that at the time and place and within the jurisdiction aforesaid, the said Henry Stone; Howard Fulbright and Dempsey Thomas did unlawfully, willfully and knowingly carry on the business of a distiller of spirituous liquors, without having given bond as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. (26 U. S. C. A. 306; R. S. 3281.)

COUNT THREE

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that at the time and place and within the jurisdiction aforesaid, the said Henry Stone; Howard Fulbright and Dempsey Thomas did unawfully, willfully and knowingly engage in and carry on the business of a distiller of spirituous liquors, with intent to defraud the United States of the tax of the spirits distilled by him; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. (26 U. S. C. A. 306, R. S. 3281.)

COUNT FOUR

And the Grand Jurors aforesaid, upon their oaths aforesaid do further present that at the time and place and within the jurisdiction aforesaid, the said Henry Stone; Howard Fulbright and Dempsey Thomas unlawfully, willfully and knowingly did work in a distillery for the production of spirituous liquors, upon which no sign bearing the words "Registered Distillery" was placed and kept, as required by law; contrary to the form of the statute in such case made and provided,

and against the peace and dignity of the United States, (26 U. S. C. A. 303-304; R. S. 3279.)

LAMAR C. McELVEY,
Foreman of the Grand Jury.

JOHN P. COWART,
Assistant United States Attorney.

BACK OF INDICTMENT

No. 960 UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF GEORGIA ALBANY DIVISION THE UNITED STATES OF AMERICA VS HENRY STONE: HOWARD FULBRIGHT: DEMPSEY THOMAS. INDICTMENT Violation: Internal Revenue Laws (Liquor) A True Bill Lamar C. McElvey, Foreman. Filed in open court this April 7th, 1936. GEORGE F. WHITE, CLERK.

PLEA

The defendants Henry Stone; Howard Fulbright and Dempsey Thomas waives arraignment and pleads guilty in open court this 20th day of July, 1936.

HENRY STONE

HOWARD FULBRIGHT

DEMPSEY THOMAS.

EXHIBIT "B"

DISTRICT COURT OF THE UNITED STATES
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

INDICTMENT NO. 960

SENTENCE

Whereupon it is considered, ordered and adjudged by the Court that the defendant Henry Stone now present in Court, be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a (Penitentiary) for the term and period of One Year and One Day and to stand committed until he shall be otherwise discharged by law.

The defendant shall also pay a fine to the United States in the sum of Three Hundred Dollars, and if such a fine is not paid same shall be collected by execution.

In open Court this the 23rd day of July, 1936.

BASCOM S. DEAVER,
United States Judge

RETURN

Now comes the respondent in the above-entitled proceeding, and, in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein; and, pursuant to Section 457 of Title 28 of the United States Code, does hereby certify that for cause of detention he holds petitioner under and by virtue of warrant of commitment issued by the United States District Court for the Middle District of Georgia, a copy of which, marked "Exhibit A", is hereto attached and made a part of this return. Also attached hereto and made a part hereof is a copy, marked "Exhibit B," of petitioner's conduct record sheet of file in the Atlanta Federal Penitentiary, showing respondent's computation of petitioner's period of servitude. Respondent further says that the facts are as follows:

Respondent holds in his possession two warrants of commitment for the incarceration of petitioner, both having been issued by the U. S. District Court for the Middle District of Georgia, and each directing imprisonment for a term of one year and one day. Petitioner was first committed to the U. S. Industrial Reformatory at Chillicothe, Ohio, under the mittimus referred to above as "Exhibit A." While serving this sentence he was on Dec. 3, 1935, released on parole. On July 23, 1936, he was returned to the Atlanta institution with a new sentence of one year and one day as evidenced by warrant of commitment, copy of which, marked "Ex-

hibit C," is annexed hereto and by reference incorporated in this return.

Petitioner was declared a parole violator, and warrant of the Parole Board issued for his retaking, dated June 3, 1936, a copy of which, marked "Exhibit D," is hereto annexed, and by reference made a part of this return. In letter dated August 24, 1936, addressed to the Warden of the Atlanta Federal Prison, signed by Ray L. Huff, Parole Executive, transmitting this warrant, respondent was directed that the warrant be placed as a detainer, and that petitioner be taken into custody on it at the expiration of the second sentence. The letter further instructed that the case should be listed for hearing on the violation charge only after the prisoner is in custody on the warrant, These instructions have been strictly complied with.

On May 12, 1937, the second sentence of one year and one day expired, and petitioner was served with the aforesaid parole warrant, and is now held under it to await the action of the next meeting of the Board of Parole.

If the two sentences of petitioner are to be computed as running concurrently, Respondent admits that his term of servitude would expire on May 12, 1937.

While it is admitted that both warrants of commitment are silent as to sequence of service, and that no directions are contained in either mittimus as to concurrent or consecutive service, respondent asserts on the other hand that the parole warrant having been executed, and the Parole Board having never revoked petitioner's parole, and the parole warrant having been

retained throughout this period as a detainer, the unexpired portion of the petitioner's first sentence still remains unsatisfied, and the Parole Board is not without jurisdiction to restrain petitioner under the aforesaid parole warrant, and to revoke his parole or take such other action as it sees fit.

Wherefore, having fully answered, respondent prays the judgment of the Court in the premises.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Asst. U. S. Attorney.

H. T. NICHOLS,
Asst. U. S. Attorney.

Counsel for Respondent.

COMMITMENT

EXHIBIT "A"

CRIMINAL NUMBER 870

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE MIDDLE DISTRICT OF GEORGIA ATHENS DIVISION

The President of the United States of America—

To the Marshal of the United States for the Middle

District of Georgia and to the Warden of the U. S. Industrial Reformatory at Chillicothe, Ohio, GREETING:

Whereas, at the June term of said Court, 1935, held at Athens, Georgia, in said district and division, to wit, on June 3rd, 1935, Henry Stone was sentenced by said Court, upon his plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Correctional Institution for and during the term and period of One Year and One Day beginning on the date on which he is received at the U. S. Industrial Reformatory (Correctional Institution) for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; and to pay a fine to the United States in the sum of $300.00 this fine to be collected by execution, and to stand committed until he shall be otherwise discharged by due course of law, for his violation of 26 U. S. C. A. 281-306-303-304. Unlawful possession of still and apparatus set up without having same registered; carrying on business of a distillery without giving bond; carrying on business of distiller with intent to defraud U. S. of tax; working in a distillery upon which no sign bearing words "Registered Distillery" was placed and kept.

And Whereas, the Attorney General of the United States has designated the U. S. Industrial Reformatory at Chillicothe, Ohio, as the place of confinement where the sentence of said Henry Stone shall be served;

Now, this is to command you, the said Marshal, forthwith to take said Henry Stone and him safely transport to said U. S. Industrial Reformatory and him there deliver to said Warden of said U. S. Industrial Reformatory with a copy of this writ; and you, the said Warden, to receive said Henry Stone and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable Bascom S. Deaver, Judge of said Court, and the seal thereof, affixed at Athens, Ga., in said district, this 3rd day of June, 1935.

GEORGE F. WHITE, *Clerk.*

Vane G. Hawkins, *Deputy Clerk.*

RETURN

I have executed the within writ in the manner following, to wit: On June 3, 1935 I delivered said Henry Stone to the Jailer of the Clarke Co. Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on June 7, 1935, I delivered said Henry Stone to the Warden of U. S. Ind. Reformatory at Chillicothe, Ohio, together with a copy of this commitment.

E. B. DOYLE, *United States Marshal.*

By C. A. Ginn, *Deputy.*

183 days remains to be served on this Writ.

JOHN H. CLARK, *Record Clerk.*

May 6, 1937.

EXHIBIT "B"—CONDUCT RECORD

UNITED STATES PENITENTIARY

ATLANTA, GEORGIA

Record of Henry Stone, Color, White, No. 48901, Crime, Illicit Distilling, etc. Sentence 2 years 2 days. Fine, $600.00; Cost, none. Not Committed. Received July 23, 1936. Where convicted, M-Ga-Athens. Sentenced 6-3-35, 7-23-36. Occupation, Laborer. Age 28. Sentence commences 6-3-35, 7-23-36. Full term expires Nov. 11, 1937. Residence, Lavonia, Ga. Action of Parole Board, 12-10-36—Did not file.

Subject completed the sentence imposed July 23, 1936, on May 12, 1937, and is being held in custody as a parole violator from USIR, Chillicothe, O., under sentence of 1 year and 1 day, imposed June 3, 1935, under which he was paroled from the Chillicothe Institution on June 3, 1936.

VIOLATIONS

6-3-35 sentenced to 1 year and 1 day.
6-7-35 received at USIR, Chillicothe, O.
12-3-35 paroled from USIR, Chillicothe, O.
6-3-36 declared parole violator.
7-23-36 Sentenced to 1 year and 1 day.
7-23-36 received at USP, Atlanta, Ga., as No. 48901.
5-12-37 sentence expired as No. 48901.
5-13-37 in custody to serve remainder of 1st sentence—has 183 days to serve if parole revoked.

Filed July 10th, 1937.

COMMITMENT

EXHIBIT "C"

CRIMINAL NUMBER 960

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

The President of the United States of America—

To the Marshal of the United States for the Middle District of Georgia and to the Warden of the U. S. Penitentiary at Atlanta, Georgia, GREETING:

Whereas, at the June Term of said Court, 1936, held at Athens, Georgia, in said district and division, to wit, on July 23, 1936, Henry Stone was sentenced by said Court, upon his plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Penitentiary for and during the term and period of One Year and One Day beginning on the date on which he is received at the U. S. Penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; and to pay a fine to the United States in the sum of $300.00, this fine to be collected by execution, and to stand committed until he shall be otherwise discharged

by due course of law, for his violation of Internal Revenue Laws (Liquor) unlawful possession of still and apparatus set up without having same registered; carrying on business of distillery without giving bond; carrying on business of distiller with intent to defraud U. S. of Tax; working in a distillery upon which no sign bearing words "Registered Distillery" was placed and kept.

And Whereas, the Attorney General of the United States has designated the U. S. Penitentiary at Atlanta, Georgia, as the place of confinement where the sentence of said Henry Stone shall be served;

Now, this is to command you, the said Marshal, forthwith to take said Henry Stone and him safely transport to said U. S. Penitentiary and him there deliver to said Warden of said U. S. Penitentiary with a copy of this writ; and you, the said Warden, to receive said Henry Stone and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable Bascom S. Deaver, Judge of said Court, and the seal thereof, affixed at Athens, Georgia, in said district, this 23rd day of July, 1936.

GEORGE F. WHITE, *Clerk*.

Vane G. Hawkins, *Deputy Clerk*.

RETURN

I have executed the within writ in the manner following, to wit: On July 23, 1936 I took into custody Henry Stone temporarily pending transfer to the institution herein designated for the service of sentence, and on July 23, 1936, I delivered said Henry Stone to the Warden of U. S. Penitentiary at Atlanta, Ga., together with a copy of this commitment.

E. B. DOYLE, *United States Marshal.*

By R. O. Doyle, *Deputy.*

EXHIBIT "D"

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

THE UNITED STATES BOARD OF PAROLE

To Any Federal Officer Authorized to Serve Criminal Process Within the United States:

Whereas, Henry Stone, Reg. No. 10984-C, was sentenced by the United States District Court for the Middle District of Georgia to serve a sentence of one year and one day for the crime of violation Internal Revenue Act and was on the third day of December, 1935, released on parole from the United States Industrial Reformatory, Chillicothe, Ohio,

AND, WHEREAS, satisfactory evidence having

been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is hereby declared to be a fugitive from justice.

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Henry Stone, wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this third day of June, 1936.

ARTHUR D. WOOD,
Chairman, U. S. Board of Parole.

When apprehended communicate with Director, Bureau of Prisons for instructions.

U. S. Penitentiary,
Atlanta, Ga.,
May 13, 1937.

The within named Henry Stone No. 48901 completed on the 12th inst., a sentence of 1 year and 1 day imposed July 23, 1936 and was held in custody from this date as a parole violator under the within mentioned warrant.

FRED G. ZERBST,
Warden.

By B. F. Bates, *Record Clerk.*

ORDER SUSTAINING WRIT OF HABEAS CORPUS AND DISCHARGING PETITIONER

The above case came on for a hearing, and was duly heard and considered.

This case involves the same questions as those in the case of *Kidwell vs. Zerbst,* No. 1192 *Habeas Corpus,* decided by this Court on May 13, 1937, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and order filed in the case of *Kidwell vs. Zerbst,* and upon authority of same;

IT IS CONSIDERED, ORDERED AND ADJUDGED that the writ of *habeas corpus* be and hereby is sustained, and that respondent discharge petitioner from custody forthwith.

This 10th day of July, 1937.

E. MARVIN UNDERWOOD,

United States Judge.

Filed July 10, 1937.

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above named appellant, F. G. Zerbst, as Warden of The United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 10th day of July, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney
HARVEY H. TYSINGER,
Assistant United States Attorney
H. T. NICHOLS,
Assistant United States Attorney
Counsel for Respondent.

Filed July 10, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. It is further ordered that pending the determination of this appeal, appellee shall be released on bail in the sum of $100.00 without sureties.

Dated this 10th day of July, 1937.

E. MARVIN UNDERWOOD,

United States Judge

JUDGE'S CERTIFICATE AS TO EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the trial of the above stated matter the only evidence introduced consisted of the petition and response together with the exhibits there referred to, and said pleadings and exhibits are hereby settled as the evidence in said case.

This 10th day of July, 1937.

E. MARVIN UNDERWOOD,

United States Judge

Filed July 10, 1937.

ASSIGNMENT OF ERRORS

And now on the 10th day of July, 1937, comes the appellant by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Asst. U. S. Attorney and H. T. Nichols, Asst. U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 10th day of July, 1937, is erroneous:

(1) Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2) Because the court erred in not ruling that the Parole Board's action was independent of the trial court's jurisdiction of the parolee in the sentence imposed in the second case.

(3) Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4) Because the court erred in ruling that the familiar rule of concurrence of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5) Because the court erred in failing to recognize that it was the legislative intent to vest the Board of

Parole with authority to prescribe the punishment for violation of parole.

(6) Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the first or parole sentence.

(7) Because under the undisputed facts as set forth in the petition for *habeas corpus* and in the answer or return of the respondent, the court erred in sustaining the *writ of habeas corpus* and in ordering the petitioner discharged from custody.

WHEREFORE the respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said *writ of habeas corpus* and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP,
United States Attorney
HARVEY H. TYSINGER,
Assistant U. S. Attorney
H. T. NICHOLS,
Assistant U. S. Attorney
Counsel for Respondent

Filed July 10, 1937.

PRAECIPE

TO THE CLERK OF THE ABOVE- ENTITLED COURT

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Apeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. The original petition for *habeas corpus* with exhibits attached thereto and order allowing the same.

2. The return of the respondent with exhibits attached thereto.

3. The judgment and order of Court of July 10, 1937.

4. Petition for appeal and order of Court allowing same.

5. Judge's certificate as to the evidence.

6. The assignment of errors.

7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth

Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent

Filed July 10, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
NORTHERN DISTRICT OF GEORGIA.)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 22 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of F. G. ZERBST, WARDEN U. S. PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, appellant, versus HENRY STONE, PETITIONER, appellee, as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledge-

ment of service thereon is included herein in the stead of a copy thereof.

In Testimony whereof I hereunto subscribe my name and affix the seal of the said District Court at Atlanta, Georgia, this the 14th day of July, A. D., 1937.

J. D. STEWARD,
Clerk, United States District Court,
Northern District of Georgia,

By C. A. McGREW, *Deputy Clerk.*

Original citation omitted from the printed record, the original thereof being on file in the office of the clerk of the United States Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

HENRY STONE

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the Court and dissenting opinion of Sibley, Circuit Judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

30
21

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN; UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts com-

mon to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934 and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct, and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct, and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

32
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There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b), prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. §753f), in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. White vs. Kwiatkowski, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. Aderhold vs. McCarthy, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon Anderson vs. Corall, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910, (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A., § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A., § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally

imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law as amended by the Act of May 13, 1930, (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A., 723 c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In Anderson vs. Corall, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October, 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect, and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In Hill vs. Wampler, 298 U. S. 460-465, it was said:

34
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"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the prisoner is returned to custody. Cf. Escoe vs. Zerbst, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole

and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function; they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A., § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is, of course, serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result it seems to me is not in accordance with law and justice.

36
27

Judgment

Extract from the Minutes of November 10, 1937

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

HENRY STONE

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,
United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 29 to 41 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8527, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Henry Stone is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 28 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of December A. D. 1937.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

petition herein for a writ of certiorari to the United States
t Court of Appeals for the Fifth Circuit is granted. And it is
er ordered that the duly certified copy of the transcript of the
edings below which accompanied the petition shall be treated
ugh filed in response to such writ.
Justice REED took no part in the consideration or decision of
pplication.

U. S. GOVERNMENT PRINTING OFFICE: 1938